IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8396 of 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 Yes
3 to 5 No

HEMANT CHAMPAKLAL SHAH
Versus
SS KHAN, AND OR HIS SUCCESSOR IN OFFICE,

Appearance:
MR KA PUJ for Petitioners
MR BB NAIK for MR MANISH R BHATT for Respondent No. 1, 2

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 16/10/2000

C.A.V. JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

Rule. Service of rule is waived by learned advocate Shri B.B. Naik for the respondents.

1. The facts leading to the present petition, in a nutshell, are as under:

2. A search was carried out at the premises of petitioners Nos. 1 to 3 on 7.12.99 under the provisions of sec.132 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') and the said search was concluded on 8.12.1999. During the course of the search, certain documents were seized by the respondents and the said documents are still in possession of the respondent authorities.

3. According to the provisions of sec. 132(8) of the Act, the books of account and other documents seized under the provisions of sec. 132(1) or sec. 132(1A) of the Act cannot be retained by the authorised officer for a period exceeding 180 days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Chief Commissioner, Commissioner, Director General or Director for such retention is obtained.

4. The grievance of the petitioners in the present petition is that, though the period of 180 days is already over, without communicating any reason to the petitioners, the respondent authorities have continued to retain their books of account and, therefore, by approaching this court, they have prayed that the action with regard of continued retention of the books of account and other documents seized by the respondent authorities during the search should be declared bad in law and the respondent authorities should be directed to return the books of account and other documents seized during the search proceedings to the petitioners immediately.

5. In pursuance of the notice issued by this court to the respondent authorities, an affidavit-in-reply has been filed by the Commissioner of Income-tax, Rajkot admitting the fact that the search had been carried out at the premises of the concerned petitioners and the books of account and other documents had also been seized by the respondent authorities. It has been however submitted that the authorised officer had handed over the seized material to the Assessing Officer and after recording the reasons in writing the Assessing Officer

had submitted his report praying for extension of time for retaining the seized material to the Commissioner. The said report/application was submitted on 11.4.2000. Upon perusal of the reasons, the Commissioner passed an order on 20.4.2000 permitting retention of the seized material till 31.3.2002. The said order was dispatched on 24.4.2000 by the Assessing Officer to M/s. M. Dineshchandra & Co. through his office (petitioner No. 1 is the proprietor of M/s. M. Dineshchandra & Co.).

6. As per the report of the Assessing Officer, as proceedings under sec. 158BC of the Act were pending and as completion of the block assessment was likely to take more time, it was necessary to retain the seized material till 31.3.2002.

7. Thus, the sum and substance of the affidavit-in-reply filed on behalf of the respondents is that the respondent authorities have a right to retain the books of account and other seized material beyond the period of 180 days provided requisite permission is obtained from one of the concerned authorities under sec. 132 of the Act and as necessary permission has been granted, it is open to the respondent authorities to retain the books of account till 31st March 2002.

8. At the time of hearing of this petition, learned advocate Shri Puj appearing for the petitioners has submitted that sec. 132(8) of the Act prescribes limit of 180 days for retention of the books of account and other material. According to sec. 132(8) of the Act, the authorised officer can normally retain the seized material for a period of 180 days without obtaining any sanction from the higher authority. According to learned advocate Shri Puj, the period prescribed under the provisions of the Act is quite reasonable and therefore unless there are exceptional circumstances, the authorised officer or the assessing officer should not ask for more time from the higher authority because within such a long period of 180 days the needful should be done by the concerned officer.

9. It has been submitted by him that according to the law laid down by the Hon'ble Supreme Court in the case of CIT v. Oriental Rubber Works, 145 ITR 477, it is not only necessary to obtain approval from the Commissioner but the reasons recorded by the authorised officer or the Assessing Officer on the basis of which the approval has been obtained should also be communicated to the assessee as expeditiously as possible after the approval is accorded by the Commissioner. In

case of default, it has been held by the Hon'ble Supreme Court that further retention of the books of account and other material seized by the authorities would become invalid and unlawful. On the basis of the law laid down by the Hon'ble Supreme Court in the case of Oriental Rubber Works (supra) it has been submitted by learned advocate Shri Puj that the respondent authorities had not communicated the reasons for which the approval was granted by the Commissioner for retention of the books of account and other seized material beyond the period of 180 days. In the circumstances, the said retention of books of account should be held to be illegal and the authorities should be directed to forthwith return the books of account to the assessees. Similar view was taken by this Court in the case of Cowasjee Nusserwanji Dinshaw v. ITO, 165 ITR 702.

10. On the other hand, learned advocate Shri B.B. Naik appearing for the respondent authorities has submitted that sec. 132(8) of the Act provides for extension of time for retaining the books of account and other material seized during the search proceedings. When the statute itself provides that the authorised officer can approach the higher authority and obtain necessary approval for retention of the seized material, by no stretch of imagination it can be said that the further retention, which is in pursuance of the provisions of sec. 132(8) of the Act is bad in law. He has relied upon the affidavit filed by the concerned officer and has also placed on record the application given by the officer to the Commissioner and he has also stated that by an order dated 20th April 2000 necessary permission has been granted for retention of the books of account and other material beyond the period of 180 days. He has therefore submitted that the action taken by the respondent authorities cannot be treated as illegal or unlawful.

11. Upon hearing the learned advocates, we specifically asked learned advocate Shri Naik appearing for the respondent authorities about the reasons for which the respondent authorities wanted to retain the books of account and other material beyond the period of 180 days. It was impressed upon the learned advocate that the respondent authorities must have a sound reason for further retention of the books of account and other material belonging to the assessees. Upon perusal of the reasons stated in the application given by the Assessing Officer it is clear that the Assessing Officer wants to retain the books of account and other material beyond the period of 180 days because notices under sec. 158BC of

the Act have been issued and, according to the provisions of the Act, the respondent authorities have to complete the assessment on or before 31st December 2001. It has been further stated in the application that for the purpose of completion of some of the consequential procedures, a further period of three months is required and therefore the Assessing Officer has prayed for extension upto 31st March 2002 and the Commissioner has granted the extension.

12. Learned Advocate appearing for the respondent authorities was unable to state any specific reason, except the one stated hereinabove, for which the books of account and other material were required to be retained beyond the period of 180 days.

13. Looking to the facts of the case, we are of the view that it would not be just and proper on the part of the respondent authorities to retain the books of account and other seized material till the block assessment is completed. It is true that the Act gives powers to the authorities to retain the books of account and other material beyond the period of 180 days but that does not mean that the permission should be granted by the higher authorities as a matter of course. The power which has been given to higher authority for giving approval for further retention of the books of account and other seized material is to be used with circumspection. The said power is to be exercised reasonably, in good faith and on correct grounds. The object of retention of the books of account and other material upto 180 days is to allow the concerned officer to go through the material seized so as to find out details about the undisclosed assets or income of the assessee which had escaped assessment. The legislature considered the period of 180 days to be reasonable period for the above purpose. Unless there is a special reason, the higher authority should not extend the said period by exercising its discretion under the provisions of sec. 132(8) of the Act. Permitting the concerned officer to cause delay in performance of his duty without any justifiable reason will amount to abuse of discretion on the part of the higher authority.

14. Looking to the facts of the case and the provisions of law, we are of the view that simply because the Commissioner has been authorised to accord approval for retention of the books of account and other material beyond the period of 180 days, it would not mean that without recording any special justifiable reason or for a vague reason he should accord his approval to the

authorised or Assessing officer as and when he makes a request for retention of the books of account or other material beyond the period of 180 days. In the circumstances, looking to the facts of the case, we hold that the reasons which have been recorded by the Assessing Officer do not appear to be just and proper as there is no logic behind the retention of the books of account and other material till the entire block assessment is over. The respondent authorities can very well take out copies of the documents required by them and can do the needful with the help of the said copies. It is always open to the respondent authorities to ask the petitioners to return the original documents in case of need.

15. As we are inclined to allow the petition on the ground stated hereinabove, we do not go into other submissions made on behalf of the learned advocate for the petitioners.

16. In the circumstances, we direct the respondents to return the books of account and other seized material within a period of 15 days from today after obtaining an undertaking from the assessee that as and when the original books of account/material are required by the authorities, they shall produce the same before the respondent authorities. It would be open to the respondent authority to take out copies of the documents required by them and to do the needful for the purpose of making identification marks or signs on the documents to be returned to the petitioners.

17. Learned Advocate for the respondent authority has submitted that the petitioners are not co-operating in the process of assessment. Mr. Puj appearing for the petitioners has submitted that the petitioners shall extend their co-operation so as to see that the assessment in accordance with law is framed as soon as possible.

18. In view of the above direction, the petition is disposed of as allowed. Rule is made absolute with no order as to costs.

(D.M. Dharmadhikari, C.J.)

(hn) (A.R. Dave, J.)

PTO

The learned counsel for the department makes a request that the department is contemplating to move the matter in the Supreme Court and because of the intervening Diwali holidays, the operative part of the order may be stayed for a reasonable period. At the request of the learned counsel, the operative part of the order shall remain in abeyance for a further period of two weeks from the date of expiry of the period of 15 days allowed to the respondents to return the books of account etc.

(D.M. Dharmadhikari, C.J.)

(A.R. Dave, J.)